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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-2113

EDDIE DASSIN, INC., a
California Corporation,

Petitioner,

vs.

EASTERN AIRLINES, INC.,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD L.M. GOLDMAN

9350 Wilshire Blvd.
Suite 224
Beverly Hills, CA 90212
(213) 878-3500 273-5700

Attorney for Petitioners

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Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 5, 1974.

OPINION BELOW

Memorandum opinion of the United States District Court for the Central District of California is unreported and a copy of same is attached hereto as Appendix A. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the holding of the District Court is reported in 501 F.2d 74, a copy of which is also attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on August 5, 1974, and a copy thereof is attached to this petition as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner Dassin contracted with Respondent Eastern to have two shipments of goods air-freighted from Los Angeles, California to San Juan, Puerto Rico. The

first shipment was unreasonably delayed and the second shipment was lost, both events due to the negligence of Eastern. Eastern's Tariff Rule No. 52 limits liability to damages calculated at $.50 per pound unless a higher value is declared on the air waybill at the time of receipt of shipment from the shipper, and if a higher value is so declared, an additional transportation charge shall be required.

The contract between Dassin and Eastern was negotiated and formed over the telephone, at which time Dassin advised Eastern of the actual value of the goods to be shipped, and Eastern entered the actual value of the goods on the air waybill, but not in the appropriate location.

The District Court held that Dassin could recover on the tardy delivery of the first shipment (which shipment Dassin refused to accept) and on the loss of the second shipment, but that the recovery was limited to $.50 per pound under Rule 52 of Eastern's Tariffs. The Court of Appeals affirmed. The questions presented are:

1. Whether a shipper who declares the actual value of a shipment to the shipping agent, and thereby has done all that he can reasonably be expected to do in order to protect his interest under the tariff rules, will be limited to the tariff recovery rate as though he had made no declaration for value.

2. Whether there exists such a conflict among the several circuits as to what are the duties of a shipper vis a vis advising the carrier of the actual value of the proposed shipment, so as to require a resolution by the United States Supreme Court.

3. Whether the District Court's memorandum opinion evidences such a gross lack of understanding of the facts presented and the issues involved, and the Court of Appeals' affirmation of the Opinion, constitute such a perversion of justice so as to invoke the supervisorial duties of the United States Supreme Court.

STATEMENT

The instant case was tried in the United States District Court for the Central District of California due to the diversity of citizenship of the parties to the action. Dassin (the plaintiff) was a California Corporation and Eastern Airlines (the defendant) was a Delaware Corporation; and the amount in controversy exceeded $10,000.00, exclusive of interest and costs.

The basic facts of the case not in dispute are as follows: Dassin telephoned Eastern's shipping agent in order to have two shipments of sweaters air-freighted from Los Angeles, California to San Juan, Puerto Rico. The agent was informed of the value of the goods and such value was typed on the air waybill. For some undetermined reason, this value was not typed in the space entitled "Declaration for Value but rather was typed in a space entitled "Nature and Quantity of Goods." In the former space was typed the symbol "MAX FREE." Testimony adduced at trial from Eastern's agent Mr. Goldberg was that Goldberg intended that the dollar

value told to him by Dassin be a "declaration of value."

The District Court held that Eastern was liable for its negligence in delivering one shipment some two months late and for losing the second shipment. The Court further held that Dassin would be limited to $.50 recovery per pound under the Tariff Rule 52 notwithstanding the fact that Eastern was apprised of the actual value of the goods and the agent for Eastern intended that such apprisal was a "declaration for value." The United States Court of Appeals for the Ninth Circuit affirmed.

REASON FOR GRANTING THE WRIT

The decisions below should be reviewed for the following reasons:

1. The opinion in Eddie Dassin, Inc. v. Eastern Airlines, Inc. (9th Cir. 1974), 501 F.2d 74, is in direct conflict with the opinion in Orlove v. Philippine Airlines (2nd Cir. 1958), 251 F.2d 384 in that the latter case holds that the person or entity accepting a shipment (in

our case Eastern's agent Goldberg) has a duty to inform the actual carrier (in our case Eastern) of the value of the shipment or at least to inform the Plaintiff to declare the value to the actual carrier when and if he had the opportunity. The Second Circuit decision that this duty exists flys in the face of the Ninth Circuit implicit holding that no such duty exists. Such a conflict between the Ninth Circuit and the Second Circuit should be resolved by the Supreme Court.

2. A gross abuse of the judicial process occurred at the trial level in that the Findings of Fact and Conclusions of Law of the trial court are contradictory, not supported by substantial evidence, contradict admitted facts, were induced by an erroneous view of the law, and were insufficient to maintain the judgment limiting Dassin's damage to $.50 per pound.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD L.M. GOLDMAN

Attorney for Petitioners

Appendix "A"

FILED

DEC 3 4 21 PM '72

CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDDIE DASSIN, INC., a California Corporation,

Plaintiff,

vs.

EASTERN AIR LINES, INC., a Corporation,

Defendant.

NO. 71-1825-DWW

MEMORANDUM OPINION

Eddie Dassin, Inc. is a California corporation located in Los Angeles which designs and furnishes knitwear to wholesalers. Much of the merchandise is made in the Orient under plaintiff's direction. In July, 1970, plaintiff contracted to sell knits to Darlene Knitwear Company located in Puerto Rico and then undertook to ship the goods to the consignee by using the services of a custom broker, an agent of Eastern Air Lines. One shipment was delivered by plaintiff to the broker on October 23, 1970 (represented by Airway Bill, No. 007 0312 8366, Exhibit No. 1) and the other on the same day (represented by Airway Bill 007 0312 8370, Exhibit No. 2). Plaintiff placed a value of $30,480.00 on the first shipment and $18,642.50 on the second, but paid only the basic transportation charges and did not offer to pay the additional 10¢ per $100 valuation

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which would have provided it with insurance to the full valuation. Mr. Dassin now contends that he would have p the extra amount had he been told of its benefit and tha it was the duty of defendant's agents to explain this to him. It is to be noted that plaintiff has been in this business for 20 years and has initiated shipments of thi type over these years.

Both shipments reached Puerto Rico on a collec air freight charge basis. The Airway Bill on the first shipment became lost and was not found until December 18 1970, and when the consignee was then notified of the arrival, it refused the goods indicating that they were intended for the Christmas market and that it was too la to sell the merchandise. Defendant continues to hold th freight because plaintiff refused to receive the return it. The whereabouts of the second shipment is somewhat a mystery. Defendant contends it delivered the goods to Puerto Rico, notified Darlene Knitwear of its arrival an turned the merchandise over to Darlene's agent who signe receipt for it and paid the freight charges of $1062.26. Plaintiff contends it received a letter from Darlene to effect that it never received these goods and it continu to refuse to pay for its value.

These shipments are governed by Tariff Rules as filed and published with the Civil Aeronautics Board defendant Eastern Air Lines, Inc. Section 1373 of the Federal Aviation Act requires each carrier to file with the Civil Aeronautics Board and to print and keep open t public inspection tariffs showing all rates, fares and charges for air transportation, and showing all classifi cations, rules, regulations, practices and services in connection with such transportation. Upon the filing of

the tariffs with the Civil Aeronautics Board, the tariffs become a part of the contract of carriage between the parties. Tishman and Lipi., Inc. v. Delta Air Lines, 275 F.Supp. 471 (S.D.N.Y. 1967); Schiff v. Emery Air Freight Corporation, 332 F.Supp. 1057 (Mass. 1971). Rule 52 of the Air Tariff Conference indicates that this shipment shall have a declared value of 50¢ per pound unless a higher value is declared on the air bill at the time of the receipt of the shipment from the shipper. If a higher value is declared, an additional transportation charge is exacted in the amount of 10¢ for each $100 by which such higher value exceeds 50¢ per pound, or $50.00, whichever is higher.

As to the first cause of action, the shipment valued by plaintiff at $30,480.00, plaintiff is bound by the limitations of liability set forth in the Air Tariff Conference of America, Rule No. 32 and Rule No. 52 and defendant's liability shall be in an amount equal to the value of the goods, not to exceed 50¢ per pound. The evidence shows that defendant continues to hold the goods listed in Exhibit 5 in its Salvage Center. As an alternative to receiving payment for the goods in plaintiff's first claim at the rate of 50¢ per pound, the plaintiff may elect to forego the payment at the limited rate and receive the return of said goods, the same to be delivered to plaintiff at the expense of defendant. Plaintiff is to give notice of this election to defendant not later than January 15, 1973 and if plaintiff makes such election, defendant shall return the merchandise prepaid to plaintiff prior to February 1, 1973.

Defendant contends it delivered the merchandise

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mentioned in plaintiff's second cause of action to the consignee and holds a document showing its receipt by a person whose identity has not been proven as being an agent of the consignee. The fact of the delivery is somewhat bolstered by defendant's cash sheet of date November 9, 1970 (Exhibit B) which shows that defendant was paid the amount of its delivery charges ($1062.26) by someone. As stated before, the consignee denies having received the goods and refuses payment of its value. These goods therefore must be considered missing and defendant shall pay plaintiff for same in an amount equal to the value of the goods, not to exceed 50¢ per pound.

Defendant shall prepare proposed findings of fact and conclusions of law and file same not later than January 15, 1973.

DATED: This 26th day of December, 1972.

David W. Wille

DAVID W. WILLIAMS,
United States District Judge

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE DASSIN, INC., a California Corporation,

Appellant,

v.

EASTERN AIRLINES, INC., a Corporation,

Appellee.

No. 73-2113

OPINION

FILED

AUG 5 1974

U. S. COURT OF APPEALS CLERK

Appeal from the United States District Court for the Central District of California

Before: ELY and CARTER, Circuit Judges, and EAST, District Judge.*

ELY, Circuit Judge:

Appellant, Eddie Dassin, Inc. (hereinafter "Dassin"), is a California corporation which designs and sells knitwear, primarily sweaters, to wholesale customers. Dassin instituted suit against Eastern Airlines, Inc. (hereinafter "Eastern"), for Eastern's alleged negligence in connection with two separate shipments of garments to Puerto Rico.[1/] The District Court found that Eastern, after taking possession of the goods, negligently delayed the delivery of one shipment for approximately two months, and that the consignee, Marlene Kramer, Inc. (hereinafter "Marlene") was justified in refusing to accept the goods because of the tardiness of the delivery. As to Dassin's claim, the court found that the second shipment was lost because of Eastern's negligence, and that Dassin was liable to the consignee.

*Honorable William [illegible], United States District Judge, Eugene, Oregon, sitting by designation.

-1-

AUG 7 - 1974

The court concluded adversely to Dassin, however, that Eastern's liability was limited to damages calculated at $0.50 per pound, rather than damages for the actual value of the garments.[2] The court based its conclusion on Tariff Rule No. 52, filed by Eastern with the Civil Aeronautics Board pursuant to 49 U.S.C. § 1373. We affirm.

In October of 1970 Dassin and Eastern entered into a written agreement in which Eastern agreed to transport two shipments of ladies' apparel from Los Angeles, California to San Juan, Puerto Rico. Eastern further agreed to deliver the shipments to Darlene in Cayey, Puerto Rico. The shipping contract was entered into by Dassin through Steve Goldberg & Company (hereinafter "Goldberg"), an authorized cargo agent for certain airlines, including Eastern. The agreement was embodied in two shipping documents[3] which were completed by Goldberg. In one space designated "DECLARED VALUE FOR CARRIAGE," each Airway Bill contained the notation "MAX FREE." The term "MAX FREE" is an abbreviation of "maximum free value" and indicates that a shipment is protected only to the amount of the tariff limit. In another space designated "NATURE AND QUANTITY OF GOODS," however, there appeared a description and estimated value of the garments.

Since the District Court found that Eastern was negligent in shipping the goods, both parties agree that Eastern's Tariff Rule No. 52 governs the disposition of the appeal. See Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401 (2d Cir. 1969); Blair v. Delta Air Lines, Inc., 344 F. Supp. 360 (S.D. Fla. 1972), aff'd mem., 477 F.2d 564 (5th Cir. 1973). Rule 52(A) provides in part:

> "[A] shipment shall have a declared value of $0.50 per pound but not less than $50.00 unless a higher value is declared on the Air Bill at the time of receipt of the shipment from the shipper, and

Airway Bills, he also explained that he was not personally involved in the transaction. Moreover, it is undisputed that Dassin failed to instruct either Eastern or Goldberg that an additional valuation charge should be assessed, nor did it pay an additional amount. In line with its own understanding of the terms of the agreement, Eastern did not in fact assess an additional shipping charge.

Based on the foregoing facts, the District Court found that Dassin did not make a declaration of value for the purpose of obtaining increased protection under Eastern's Tariff Rule No. 52.

Under the applicable tariff rule the shipper, Dassin, had the obligation to inform the carrier that it desired protection in excess of the tariff limit. Additionally, a shipper, in order to obtain enlarged coverage, must agree to pay the carrier the additional transportation charge specified in Tariff Rule No. 52. Obviously, the Airway Bills pertaining to the subject shipments did not clearly indicate a desire on the part of Dassin to acquire the additional coverage. There substantial evidence at trial which supports the conclusion that neither party intended that the garments be shipped at th higher rate. Moreover, there was ample evidence to support the court's finding that Dassin did not inform the carrier tha it desired the additional coverage. The District Court's dispositive factual findings are amply supported by substantia evidence, and it correctly concluded that Dassin's recovery was restricted by the tariff limitation of 50 cents per pound.

Dassin's contention that the trial judge erroneously failed to consider certain hearsay evidence is without merit.

AFFIRMED.

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P-20-CO-8026-4301

Footnote 1/ (Reference page 1)

Jurisdiction was based on diversity of citizenshi; 28 U.S.C. § 1332.

Footnote 2/ (Reference page 2)

On Dassin's first claim, the court held that Dassin was entitled to damages in the amount of $1,800.50, that Dassin could recover the goods, which remained in East possession. Additionally, the District Court held that Dass was entitled to $1,786.50 on its second claim.

Footnote 3/ (Reference page 2)

The two documents were designated "Airway Bill N. 007-0312 8366" and "Airway Bill No. 007-0312 8370."

THE BRIEF SHOP

10844 VENTURA BOULEVARD
NORTH HOLLYWOOD, CA. 91604

LAWYERS BRIEF SERVICE
LEGAL & COMM. PRINTING

(213) 877-8620 763-2965